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District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

MAR 18 2016

By _____ Clerk
_____ Deputy Clerk

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BALLENTYNE DITCH COMPANY; BOISE VALLEY IRRIGATION DITCH COMPANY; CANYON COUNTY WATER COMPANY; EUREKA WATER COMPANY; FARMERS' CO-OPERATIVE DITCH COMPANY; MIDDLETON MILL DITCH COMPANY; MIDDLETON IRRIGATION ASSOCIATION, INC.; NAMPA & MERIDIAN IRRIGATION DISTRICT; NEW DRY CREEK DITCH COMPANY; PIONEER DITCH COMPANY; PIONEER IRRIGATION DISTRICT; SETTLERS IRRIGATION DISTRICT; SOUTH BOISE WATER COMPANY; and THURMAN MILL DITCH COMPANY;

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES; and GARY SPACKMAN, in his capacity as the Director of the Idaho Department of Water Resources,

Respondents,

and

SUEZ WATER IDAHO INC.,

Intervenor.

Case No. CV-WA-2015-21376
(Consolidated Ada county Case
No. CV-WA-2015-21391)

**SUEZ'S BRIEF IN OPPOSITION TO
DITCH COMPANIES' MOTION TO STAY**

IN THE MATTER OF ACCOUNTING FOR
DISTRIBUTION OF WATER TO THE
FEDERAL ON-STREAM RESERVOIRS IN
WATER DISTRICT 63

INTRODUCTION

Suez Water Idaho Inc. (“Suez”),¹ through its attorneys of record Givens Pursley LLP, provides this brief in opposition to the *Ditch Companies’ Motion to Stay* (“*Motion*”) dated March 8, 2016. The *Motion* purports to promote judicial economy by avoiding potentially conflicting decisions. It would do the opposite. The *Motion* is nothing more than an attempt to promote piecemeal litigation while keeping this Court from seeing the entire picture on the refill issue. The Court should deny the *Motion*.

ARGUMENT

There are two cases pending before this Court that, as currently postured, do not completely overlap but touch upon the same central question: how is water counted or credited toward the “fill” or “satisfaction” of decreed water rights for the Boise River’s federal on-stream reservoirs?² In the above-captioned judicial review proceeding (which the Ditch Companies

¹ Suez began its participation in this proceeding under its former name, United Water Idaho Inc., which was formally changed on November 9, 2015, by filing the appropriate articles of amendment with the Idaho Secretary of State. The name change reflects no change in corporate ownership or management.

² The current posture of one case (the so-called “Late Claims”) should never have been about how water is counted or credited to decreed storage water rights, but it has taken on that theme because the Special Master agreed with the Ditch Companies and the Boise Project Board of Control (“Boise Project”) that storage water rights decreed nearly a decade ago (the “Base Rights”—see footnote 4 at page 5) contain an unstated entitlement for “priority refill” despite the fact that the decrees and their predecessor licenses are silent on the issue. The Ditch Companies and Boise Project have turned the Late Claims proceeding on its head, asking the Special Master to dismiss the Late Claims sought by the Bureau of Reclamation and the Boise Project on the theory that they do not need them after all. The Late Claims should be dismissed, but not for that reason. They should be dismissed because the claimants cannot prove the validity and existence of water rights under the constitutional method of appropriation. Suez reserves all positions and arguments to the effect that the Special Master should not have “interpreted” the Base Rights at all, let alone in a manner that makes the Late Claims unnecessary.

would like to stay), the Director of IDWR determined that his current accounting system based on one-fill, storable inflow, paper fill, and free-river refill principles is consistent with Idaho's Prior Appropriation Doctrine.³ He also ruled that the Ditch Companies and the Boise Project did not propose any legally permissible alternative. Suez agrees with the Director on both counts. Suez further believes that the one-fill, storable inflow, paper fill, and free-river refill principles are not only permissible under Idaho law (*i.e.*, within the bounds of the Director's discretion), but that Idaho's Prior Appropriation Doctrine allows no alternative.

The Ditch Companies and Boise Project initiated this judicial review proceeding in December 2015 because they disagree with the Director. But now they want to put this proceeding on hold until the Court reviews challenges (filed last week) to a Special Master's decision in *SRBA Consolidated Subcase Nos. 63-33732, et al.* (the "Late Claims").

The reason why is obvious: they agree with the Special Master's decision and would prefer that this Court review that decision in a vacuum, without considering the administrative decision reached by the Director and the extensive record supporting that decision. In short, they seek an end run of the administrative procedures mandated by the Idaho Administrative Procedure Act and the Idaho Supreme Court in Basin Wide Issue 17.

In the Basin Wide Issue 17 proceeding, the Idaho Supreme Court held that this Court did not abuse its discretion "in declining to designate the question of whether flood control releases count toward the 'fill' of a water right as a basin-wide issue," and the Supreme Court also declined to "answer that question on appeal." *A&B Irrigation Dist. v. State* ("A&B"), 157 Idaho

³ The Director agreed with the concepts of one-fill, storable inflow, paper fill, and free-river refill, but he used different terminology. In its brief to the Idaho Supreme Court on appeal of the SRBA District Court's decision in the Basin-Wide Issue 17 litigation, Suez (then United Water) addressed these fundamental Prior Appropriation principles and set out extensive authority addressing them from Idaho and other prior appropriation states. *See Brief of Respondent United Water Idaho Inc. ("Appellate Brief")* at 21-41, Idaho S. Ct. Docket Nos. 40974-2013 and 40975-2013 (Oct. 23, 2013). Suez's *Appellate Brief* is incorporated herein by reference, and is in this proceeding's agency record at pp. 425-516 (Exhibit 1 to the January 26, 2015 *Affidavit of Christopher H. Meyer*).

385, 392, 336 P.3d 792, 799 (2014). Instead, the Supreme Court observed: “There is an administrative procedure for fleshing out these factual interpretations if the SRBA court chooses to address the issue of fill on remand.” *A&B*, 157 Idaho at 392, 336 P.3d at 799. “Which accounting method to employ is within the Director’s discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.” *A&B*, 157 Idaho at 394, 336 P.3d at 801.

That contested case administrative process is now complete, and this judicial review is pending. As our Supreme Court has made clear, that is the proper way to resolve the refill question.

Now the Ditch Companies seek to stay this judicial review so the Court can instead answer the very same question in the context of the Special Master’s decision in the Late Claims proceedings—which was favorable to them. This attempt to leapfrog the Supreme Court mandated procedure should be denied.

The Ditch Companies argue that staying the judicial review will reduce the danger of inconsistent decisions and promote judicial economy. *Ditch Companies’ Memorandum in Support of Motion to Stay (“Brief”)* at 9-11. In fact, the proposed stay would increase the risk of inconsistent decisions and undermine judicial economy by presenting the Court with relevant facts and law in a piecemeal fashion. Rather than staying one proceeding, Suez urges that treating them as companion cases and hearing them both before a decision is rendered would better achieve the suggested goals.

The Ditch Companies also argue that the SRBA must first determine the elements of the Base Rights before it can address whether the Director’s administration of those rights is lawful. *Brief* at 7-8. But the SRBA Court already has determined the elements of the Base Rights—it

did so when it issued their partial decrees nearly a decade ago.⁴ As the Idaho Supreme Court said in the Basin Wide Issue 17 appeal, all the Director has to do to determine what rights are to be administered is to look at the decrees:

Here, the Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user. However, it is within the Director's discretion to determine when that number has been met for each individual decree.

A&B, 157 Idaho at 394, 336 P.3d at 801.

The Ditch Companies also argue that the water rights at issue in the Late Claims and this judicial review are “the same.” *Brief* at 8-9. Suez agrees that the water rights “interpreted” by the Special Master are the same Base Rights administered by the Director, but this reveals a fundamental problem with the Special Master's decision. Rather than determining the validity of the Late Claims under the constitutional method of appropriation (which requires the claimants to establish diversion and application of the water to a beneficial use), the Special Master denied the Late Claims on grounds that the Base Rights should be administered to allow a second fill under priority. In short, the Special Master's decision on the Late Claims is not about the Late Claims at all—it is about the administration of water rights decreed years ago.

Suez requests the Court deny the Ditch Companies' *Motion* because it is designed to frustrate judicial economy and allow potentially inconsistent decisions. It also should be denied because, contrary to the Ditch Companies arguments, the procedural rules they cite do not

⁴ The Base Rights are: Nos. 63-303 and 63-3613 for Arrowrock reservoir (partial decrees issued June 28, 2007), No. 63-3614 for Anderson Ranch reservoir (partial decree issued Feb. 25, 2009), and No. 63-3618 for Lucky Peak reservoir (partial decree issued Dec. 18, 2008). There was no appeal of the Base Rights' partial decrees, and a Final Unified Decree has now issued. Not surprisingly, there has been no request to formally reopen them at this late stage under Idaho R. Civ. P. 60(b).

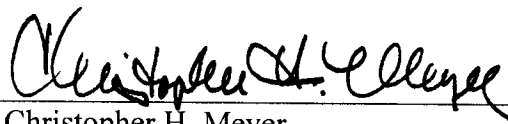
provide for their requested stay,⁵ and this judicial review proceeding reached this Court before the challenge to the Special Master's decision.⁶

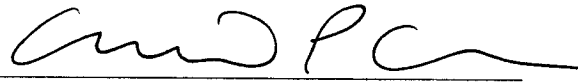
CONCLUSION

For these reasons, Suez respectfully requests that the *Motion* be denied.

Respectfully submitted this 17th day of March, 2016.

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

By 
Michael P. Lawrence

Attorneys for Suez Water Idaho Inc.

⁵ The Ditch Companies cite Idaho Rule of Civil Procedure 84(m) and Idaho Code Section 67-5274 as the basis for their *Motion*. These, however, do not provide for staying judicial review proceedings. Rather, they provide for staying the agency action under review.

⁶ This judicial review proceeding commenced when the Ditch Companies and the Boise Project filed their petitions for judicial review on December 17, 2015. Suez's and the State of Idaho's Notices of Challenge to the Special Master's decision were filed last week, on March 11, 2016, and this Court has ordered the briefing and oral argument on the challenges to occur after all briefing and oral argument in the judicial review proceeding is concluded.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2016, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

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